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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

NAOMI ARCURI,

Petitioner,

v.

DEBORAH PATRICK, WARDEN

Respondent.

Case No. EDCV 08-00829 JFW (AN)

**MEMORANDUM AND ORDER
DISMISSING HABEAS PETITION
AS TIME-BARRED**

Before the Court is a petition for a writ of habeas corpus (“Petition”) brought pursuant to 28 U.S.C. § 2254 by Naomi Arcuri (“Petitioner”), a state prisoner proceeding *pro se*. For the reasons discussed below, the Petition is dismissed with prejudice because the Court finds it is time-barred.

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I. BACKGROUND

A. State Court Proceedings

On September 2, 2003, Petitioner was convicted by jury trial in the Riverside County Superior Court of second degree murder. (Pet. 2; No. HEF004579.)

On direct review, the face of the Petition and relevant state court records^{1/} show Petitioner appealed her judgment of conviction to the California Court of Appeal (No. E034686) that was affirmed on April 18, 2005. Relevant state court records also establish that Petitioner subsequently filed a petition for review with the California Supreme Court (No. S134228) that was summarily denied on June 29, 2005. (Pet. 4; Official records of California courts.) On collateral review, as further addressed below, Petitioner filed a slew of state habeas petitions with the trial court and both state appellate courts, all of which were denied. (*See infra* Section II.C.1.)

B. Pending and Prior Federal Proceedings^{2/}

On June 19, 2006, Petitioner filed a document that was liberally construed as a motion for an extension of time to file a federal habeas petition and related request to stay the action to give her time to exhaust her state remedies. (No. CV 06-3849 JFW (AN), Docket No. 1.) On June 30, 2006, the Court issued a Memorandum and Order dismissing the action without prejudice to Petitioner filing a proper federal habeas petition because the document itself failed to raise any habeas claims. (Docket No. 3.)

On August 2, 2007, Petitioner filed her first federal habeas petition with this Court ("2007 Petition"). (No. EDCV 07-960 JFW (AN), Docket No. 1.) The 2007 Petition raised three claims that were either unexhausted or non-cognizable, therefore, the 2007 Petition was summarily dismissed without prejudice on August 9, 2007.

^{1/} The Court takes judicial notice of Petitioner's records in the state appellate courts, which are available on the Internet at <http://appellatecases.courtinfo.ca.gov>. *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take judicial notice of relevant state court records in federal habeas proceedings).

^{2/} The Court takes judicial notice of its own records. Fed. R. Evid. 201.

1 (Docket Nos. 3, 4). *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887 (1995) (A
2 petitioner must fairly present each federal claim to the state's highest court in order to
3 satisfy the exhaustion requirement).

4 On June 8, 2008, Petitioner constructively filed her pending Petition that raises
5 nine claims for relief.^{3/} Pursuant to the Court's duty to screen § 2254 petitions, the
6 Magistrate Judge found the face of the Petition and relevant state court records plainly
7 disclosed that this action was barred by the one-year statute of limitations of the Anti-
8 Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C.
9 §2244(d)(1)(A). Accordingly, on June 26, 2008, the Magistrate Judge issued an order
10 to show cause that notified Petitioner the action appeared to be time-barred absent
11 some other basis for tolling or an alternative start to AEDPA's one-year limitation
12 period under 28 U.S.C. § 2244(d)(1)(B)-(D). (*See* Jun. 26, 2008, Order to Show Cause
13 Re Dismissal of Habeas Petition As Time-barred ("OSC")). The OSC discussed
14 various bases for tolling and directed Petitioner to show cause why the action was not
15 time-barred by filing a written response no later than July 17, 2008. (OSC 8:3-6.) The
16 OSC warned Petitioner that her failure to file a timely response to the OSC would
17 result in a waiver of her right to respond to the OSC, and that her Petition would be
18 dismissed with prejudice as time-barred without further notice. (OSC 8:18-23.)
19 Petitioner filed a timely response to the OSC ("OSC Response"). The matter now
20 stands submitted.

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22 ^{3/} Pursuant to the "mailbox rule," a *pro se* prisoner's habeas petition is deemed
23 to be filed on the date the prisoner delivers the petition to prison authorities for mailing
24 to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379 (1988); *Huizar*
25 *v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The mailbox rule also applies to *pro*
26 *se* state habeas petitions. *Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).
27 The pending Petition was filed by the Clerk on June 20, 2008, however, for purpose
28 of the timeliness analysis, the Court gives Petitioner the benefit of the doubt by
assuming she constructively filed the Petition on June 8, 2008, the date she signed it.
(Pet. 8.)

II. DISCUSSION

A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, states that “the judge to whom [the petition] is assigned” is required to examine the petition promptly and “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

B. Statute of Limitations

The Petition is governed by AEDPA, which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court, because the Petition was filed after April 24, 1996, AEDPA’s enactment date. 28 U.S.C. § 2244(d)(1); *See Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In most cases, the limitation period begins to run from “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

As discussed above, the face of the Petition and relevant state court records show Petitioner sustained her underlying conviction on September 2, 2003, and was sentenced on October 31, 2003. (Pet. 2.) The Petition and relevant state court records also establish that the California Supreme Court denied her petition for review on June

1 29, 2005, and that Petitioner never filed a petition for certiorari with the United States
2 Supreme Court. (Pet. 4; Official records of California courts.) Therefore, for purposes
3 of AEDPA's limitation period, her judgment became final on September 27, 2005,
4 which is the ninetieth day after her petition for review was denied by the California
5 Supreme Court and the time for Petitioner to file a petition for certiorari with the
6 Supreme Court expired. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The
7 limitation period then started to run the next day, September 28, 2005, and ended a
8 year later on September 27, 2006. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v.*
9 *Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to run
10 on the day after the triggering event pursuant to Fed. R. Civ. P. 6(a)).

11 Petitioner missed the deadline because she did not constructively file the
12 pending Petition until June 8, 2008 -- 620 days after the statute expired. Therefore, the
13 pending Petition is time-barred unless Petitioner is entitled to statutory or equitable
14 tolling, or an alternate start date to AEDPA's statute of limitations period under 28
15 U.S.C. § 2244(d)(1).

16 **C. Statutory Tolling**

17 **1. State Habeas Petitions**

18 AEDPA provides a statutory tolling provision that suspends the limitation period
19 for the time during which a "properly-filed" application for post-conviction or other
20 collateral review is "pending" in state court. 28 U.S.C. § 2244(d)(2); *Bonner v. Carey*,
21 425 F.3d 1145, 1148 (9th Cir. 2005). An application is "pending" until it has achieved
22 final resolution through the state's post-conviction procedures. *Carey v. Saffold*, 536
23 U.S. 214, 220, 122 S. Ct. 2134 (2002). The limitation period is not tolled between the
24 time a final decision is issued on direct state appeal and the time a state collateral
25 challenge is filed because there is no case "pending" during that interval. *Thorson v.*
26 *Palmer*, 479 F.3d 643, 646 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th
27 Cir. 1999). On collateral review, however, "intervals between a lower court decision
28 and a filing of a new petition in a higher court," when reasonable, fall "within the

1 scope of the statutory word ‘pending’” thus tolling the limitations period. *Saffold*, 536
2 U.S. at 221, 223; *Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006) (citing
3 *Saffold*).

4 On August 24, 2006 -- 330 days after the one-year limitation period started to
5 run on September 28, 2005 -- Petitioner filed her first state habeas petition with the
6 Riverside County Superior Court and, on November 14, 2006, the petition was denied,
7 leaving thirty-five days remaining before the limitation period expired. Under
8 AEDPA, Petitioner is not entitled to statutory tolling for this 330-day period because
9 there was no case “pending” during this interval. See *Thorson*, 479 F.3d at 646; *Nino*,
10 183 F.3d at 1006.

11 Petitioner is entitled to statutory tolling for one complete round of habeas
12 review from August 24, 2006, to June 27, 2007, the period during which all three of
13 her state habeas petitions were pending and later denied in the state courts because the
14 delay was not unreasonable and she was proceeding to the next higher level of review.^{4/}
15 (Pet. 4.) *Saffold*, 536 U.S. at 221; *Evans*, 546 U.S. at 192. Given 307 days of statutory
16 tolling, the limitation period was extended from September 27, 2006, to July 31, 2007.

17 Petitioner is not entitled to statutory tolling for the period during which her last
18 three state habeas petitions were pending, and later denied in the appellate courts,
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22 ^{4/} As previously noted above, on August 24, 2006, Petitioner filed her first
23 state habeas petition in the Riverside County Superior Court (No. RIC459749) that was
24 summarily denied on November 14, 2006. (Pet. 4; Official records of California
25 courts.) Further, on December 19, 2006, Petitioner filed a second habeas petition in
26 the California Court of Appeal (No. E041977) that was summarily denied on January
27 2, 2007. (*Id.*) On January 29, 2007, Petitioner filed her third habeas petition in the
28 California Supreme Court (No. S149797) that was denied on June 27, 2007, citing *In*
re Swain, 34 Cal. 2d 300, 304 (1949) and *People v. Duvall*, 9 Cal. 4th 464, 474 (1995).
(*Id.*)

1 because she was not proceeding to the next higher level of review.^{5/} (*Id.*) *Saffold*, 536
2 U.S. at 221; *Evans*, 546 U.S. at 192; *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir.
3 2003) (In order for a petitioner to toll the interval between two state applications for
4 post-conviction relief, she normally must have “worked [her] way up the ladder” of
5 state courts.) Here, Petitioner returned to a lower court after the state’s highest court
6 dismissed her claims on June 27, 2007, thereby precluding tolling. (*Id.*)

7 Thus, Petitioner is not entitled to statutory tolling for her remaining fourth
8 through sixth state habeas petitions because the petitions were filed after the extended
9 statute of limitations period expired on July 31, 2007, and has no tolling consequence.
10 *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2254 does
11 not permit the reinitiation of the limitations period that has ended before the state
12 petition was filed”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (stating that
13 filing of state petition after AEDPA’s one-year time period has elapsed bars federal
14 habeas review); *Webster v. Moore*, 199 F.3d 1259 (11th Cir. 2000) (“A state-court
15 petition [] that is filed following the expiration of the limitations period cannot toll that
16 period because there is no period remaining to be tolled”).

17 Accordingly, the face of the Petition and relevant state court records establish
18 that this Petition, constructively filed on June 8, 2008, is untimely by 313 days (the
19 amount of untolled time between the new limitation deadline (07/31/07) and the
20 Petition’s filing date (06/08/08)).

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22 ^{5/} After Petitioner completed her first round of collateral review to the
23 California Supreme Court, on September 17, 2007, Petitioner returned to the California
24 Court of Appeal (No. E044082) and filed her fourth state habeas petition that was
25 denied on September 25, 2007. (Pet. 5; Official records of California courts.) On
26 October 22, 2007, Petitioner filed her fifth state habeas petition in the California
27 Supreme Court (No. S157421) that was denied on April 9, 2008. (Pet. 4; Official
28 records of California courts.) Finally, on May 14, 2008, Petitioner filed her sixth state
habeas petition in the California Supreme Court (No. S163540) that is currently
pending. (*Id.*)

2. 2007 Petition

Petitioner's 2007 Petition also has no bearing on the Court's timeliness analysis. By AEDPA's express terms under § 2244(d)(2), the one-year limitation period is only tolled during the pendency of "a properly filed application for *State* post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2) (emphasis added). Section 2244(d)(2) does not toll the limitation period while a *federal* habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). Further, the pending action cannot "relate back" to the 2007 Petition because that action was dismissed. *See Rasberry v. Garcia*, 448 F.3d 1150, 1155 (9th Cir. 2006) ("a habeas petition filed after the district court dismisses a previous petition without prejudice for failure to exhaust state remedies cannot relate back to the original habeas petition"); *Dils v. Small*, 260 F.3d 984, 986 (9th Cir. 2001). Moreover, Petitioner does not qualify for the very narrow exception to this "relation back" rule because the 2007 Petition was *properly* dismissed. Even if the current Petition *could* relate back to the 2007 Petition, the Petition is still time-barred because the 2007 Petition was filed after Petitioner completed her first round of collateral review, and after the extended statute of limitations period had already expired.

D. Alternative Start of the Statute of Limitations

1. State-Created Impediment

In rare instances, AEDPA provides that its one-year limitation period shall run from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B). Asserting that the statute of limitations was delayed by a state-created impediment requires a showing of a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir. 2002). Petitioner's OSC Response, the face of the Petition, and relevant state court records do not set forth any facts showing that Petitioner is entitled to relief under this provision.

2. Newly Recognized Constitutional Right

1 AEDPA provides that, if a claim is based upon a constitutional right that is
 2 newly recognized and applied retroactively to habeas cases by the United States
 3 Supreme Court, the one-year limitation period begins to run on the date which the new
 4 right was initially recognized by the United States Supreme Court. 28 U.S.C. §
 5 2244(d)(1)(C). Petitioner's OSC Response, the face of the Petition, and relevant state
 6 court records do not set forth any facts that show Petitioner is entitled to relief under
 7 this provision.

8 **3. Discovery of Factual Predicate**

9 AEDPA also provides that, in certain cases, its one-year limitation period shall
 10 run from "the date on which the factual predicate of the claim or claims presented
 11 could have been discovered through the exercise of due diligence." 28 U.S.C. §
 12 2244(d)(1)(D). Petitioner's OSC Response, the face of the Petition, and relevant state
 13 court records do not set forth any facts showing that Petitioner is entitled to relief based
 14 upon a late discovery of the factual predicate.

15 **E. Equitable Tolling**

16 "[E]quitable tolling is justified in few cases," and "the threshold necessary to
 17 trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the
 18 rule." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "Generally, a litigant
 19 seeking equitable tolling bears the burden of establishing two elements: (1) that he has
 20 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood
 21 in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005). In her
 22 OSC Response, Petitioner appears to proffer two grounds for equitable tolling. As the
 23 ensuing analysis demonstrates, neither of these apparent grounds satisfy the *Pace*
 24 elements for equitable tolling.

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27 **1. Lack of Legal Training, Representation, and/or Education Claims**

28 Petitioner generally appears to contend she is entitled to equitable tolling

1 because of her lack of legal training, lack of legal representation, and/or general lack
2 of education. (OSC Response 2.) The Court rejects this contention. Neither the lack
3 of assistance, education, or ignorance of the law qualify as extraordinary circumstances
4 warranting equitable tolling. *See Rasberry*, 448 F.3d at 1154 (“a pro se petitioner’s
5 lack of legal sophistication is not, by itself, an extraordinary circumstance warranting
6 equitable tolling” of AEDPA’s limitation period); *Romeo v. Alameida*, No. C02-2263
7 VRW (PR), 2003 WL 21714024, *4 (N.D. Cal. July 16, 2003); *Ekenberg v. Lewis*, No.
8 C 98-1450 FMS (PR), 1999 WL 13720, *2 (N.D. Cal. Jan. 12, 1999) (“Ignorance of
9 the law and lack of legal assistance do not constitute such extraordinary
10 circumstances.”); *Bolds v. Newland*, No. C 97-2103 VRW (PR), 1997 WL 732529, *2
11 (N.D. Cal. Nov. 12, 1997) (same); *see also Hinton v. Pac. Enter.*, 5 F.3d 391, 396-97
12 (9th Cir. 1993) (mere ignorance of the law generally is an insufficient basis to
13 equitably toll the running of an applicable statute of limitations); *Barrow v. New*
14 *Orleans S.S. Ass’n*, 932 F.2d 473, 478 (5th Cir. 1991) (neither “lack of knowledge of
15 applicable filing deadlines,” nor “unfamiliarity with the legal process,” nor “lack of
16 representation during the applicable filing period,” nor “illiteracy,” provides a basis for
17 equitable tolling); *cf. Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 909 (9th
18 Cir.1986) (holding pre-AEDPA that illiteracy of *pro se* prisoner is insufficient to meet
19 standard of an objective, external factor amounting to “cause” for purposes of avoiding
20 procedural bar on habeas claims).

21 **2. Medical Disabilities**

22 Petitioner also appears to allege that she is entitled to equitable tolling because
23 any delay should be attributed to her visual and hearing impairments. (OSC Response
24 2.) Aside from her vague and conclusory allegations, none of the medical impairments
25 that she claims to suffer from establish that they prevented her from filing a timely
26 Petition. Moreover, physical disabilities alone do not warrant equitable tolling where
27 other evidence shows the petitioner could still have filed a timely petition. *See Gaston*
28 *v. Palmer*, 417 F.3d 1030, 1034-35 (9th Cir. 2005) (petitioner was not entitled to

1 equitable tolling based upon physical and mental disabilities since he prepared and
2 filed a state habeas petition while suffering from the alleged disabilities). Since her
3 conviction in October 2003, Petitioner's own actions establish that she has proven to
4 be an active legal researcher and writer in the prison system. Indeed, with the
5 exception of "the very first [state habeas] appeal" filed with the assistance of her
6 attorney sometime around "July 6, 2006," she managed to file *five* subsequent state
7 habeas petitions during the course of her purported medical disabilities. Petitioner has
8 quite simply failed to show the slightest causal link between the alleged disabilities and
9 her failure to file a federal habeas petition on time. *Allen v. Lewis*, 255 F.3d 798, 800-
10 01 (9th Cir. 2001) ("the prisoner must show that the 'extraordinary circumstances'
11 were the but-for and proximate cause of [her] untimeliness."). Regardless of *how*
12 Petitioner managed to file five state habeas petitions, write letters, and investigate her
13 case, the undisputed fact is that she accomplished these things in spite of her alleged
14 disabilities. Thus, Petitioner has failed to show that her alleged disabilities amounted
15 to extraordinary circumstances beyond her control that made it *impossible* for her to
16 file a timely petition. *Brambles v. Duncan*, 412 F.3d 1066, 1069 (9th Cir. 2005).

17 To recap, the Court finds Petitioner is not entitled to equitable tolling because
18 she has failed to satisfy either of the *Pace* elements. Petitioner has not met her burden
19 to show she was reasonably diligent in pursuing federal habeas relief throughout the
20 time that AEDPA's limitation period was running, nor has she established that any
21 extraordinary circumstance beyond her control made it *impossible* for her to file the
22 Petition on time, despite having an opportunity to do so. *Id.* at 1069. Thus, the Court
23 finds the OSC Response, Petition, and relevant state court records establish the Petition
24 is untimely and subject to dismissal with prejudice.

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27 ORDER

28 The Court finds the Petition must be dismissed because it is time-barred for the

1 reasons stated above and in the Court's OSC. Further, by way of the OSC, the Court
2 finds Petitioner has already received notice and an opportunity to show cause why the
3 Petition should not be dismissed as time-barred, which Petitioner has taken advantage
4 of by filing her aforementioned OSC Response. In this regard, the Court has reviewed
5 the OSC Response and finds the objections to the OSC lack merit, therefore, the
6 objections are overruled. ACCORDINGLY, IT IS HEREBY ORDERED THAT the
7 reference to the Magistrate Judge is vacated and the Petition is dismissed with
8 prejudice. The Clerk is directed to enter judgment dismissing the action with
9 prejudice. Any and all pending motions are terminated.

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12 DATED: July 31, 2008

/s/ JOHN F. WALTER
JOHN F. WALTER
UNITED STATES DISTRICT JUDGE

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14
15 Presented by:

16
17 /s/ ARTHUR NAKAZATO
Arthur Nakazato
United States Magistrate Judge